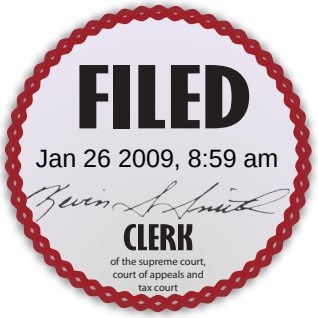

ATTORNEY FOR APPELLANT:

ELIZABETH A. GABIG
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

BRIAN McMANUS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0804-CR-372
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No. 49G22-0709-MR-197931

January 26, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Brian McManus appeals his conviction and fifty-five year sentence for murder. We affirm.

Issues

The issues before us are:

I. whether the trial court properly refused McManus's proposed jury instruction regarding the defense of one's dwelling;

II. whether the State presented sufficient evidence that McManus knowingly killed the victim;

III. whether the State presented sufficient evidence to rebut McManus's self-defense claim; and

IV. whether McManus's sentence is inappropriate.

Facts

In September 2007, a group of homeless men that included McManus, Stephen McCabe, "Mountain Man," "Little Timmy," and Joseph Martin slept in a wooded area in the 2100 block of South Shelby Street in Indianapolis. Tr. pp. 12-13. McManus attempted to demarcate a part of the wooded area as his own by surrounding it with a comforter, two pillows, and branches and leaves. On the morning of September 23, 2007, after answering a call to the area, Indianapolis Metropolitan Police discovered Martin's lifeless body among the trees. McCabe was present and he told the police the previous night he overheard "Mountain Man" and McManus talking. McCabe told the police he heard McManus say he told Martin to leave the area, but Martin refused; therefore, McManus stabbed him.

Officer Mark Euler went to the wooded area and saw McManus sitting on a bench. As he approached, he saw McManus throw a knife into the dirt fifteen to twenty feet behind him. Officer Euler then took McManus into custody. The knife was recovered and Martin's blood was found on it.

McManus gave a statement to the police while in custody. In his statement he said Martin wanted to take McManus's bicycle away from him and pushed him. McManus said he pushed back, Martin grabbed his shirt, and the two went rolling down the hill. While they were tumbling, McManus pulled a knife out of his pocket and stabbed Martin. An autopsy of Martin's body was performed by Dr. Joyce Carter. Dr. Carter found four stab wounds and one incised wound on Martin's body. Dr. Carter confirmed the stab wounds caused Martin's death.

The State charged McManus with murder. At trial, McManus submitted a proposed jury instruction regarding use of deadly force to protect a person's dwelling. The trial court refused the instruction; however, it gave another self-defense instruction that did not specifically refer to defense of one's dwelling.

The jury found McManus guilty of murder. At sentencing the trial court considered McManus's criminal history to be a significant aggravator[1] and found no mitigating factors. The trial court sentenced McManus to fifty-five years with five years suspended to probation. McManus now appeals.

[1] Both the probation officer who prepared the presentence report and the trial court stated that McManus has a total of five felony and eleven misdemeanor convictions. The State repeats this assertion in its brief. Having closely reviewed the presentence report's listing of McManus's criminal history, we find that he has four felony convictions and fifteen misdemeanor convictions.

Analysis

I. Jury Instruction

McManus contends the trial court improperly refused his proposed jury instruction regarding the defense of one's dwelling. A trial court has broad discretion in instructing a jury, and we review its decision only for an abuse of that discretion. Jackson v. State, 890 N.E.2d 11, 20 (Ind. Ct. App. 2008). If a trial court refuses an instruction, we must consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. Id. "Jury instructions are to be considered as a whole and in reference to each other, and an error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case." Id. If error is found, the burden is on the defendant to show the instructional error prejudiced his or her substantial rights. Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006).

McManus tendered a proposed jury instruction in regard to his claim of self-defense. The instruction reproduced Indiana Code Section 35-41-3-2 and stated in part:

> (b) A person:
>
> (1) is justified in using reasonable force, including deadly force, against another person; and
>
> (2) does not have a duty to retreat;
>
> if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle.

App. p. 52.

The trial court refused the above instruction, but gave one that stated in part:

> A person may use reasonable force against another person to protect himself from what the person reasonably believes to be the imminent use of unlawful force.
>
> A person is justified in using reasonable force against another person if the person reasonably believes that the force is necessary to immediately prevent or terminate the other person's trespass on or criminal interference with property lawfully in the person's possession.
>
> A person is justified in using deadly force and does not have a duty to retreat only if he reasonably believes that deadly force is necessary to prevent serious bodily injury to himself or the commission of a forcible felony.

App. p. 64.

McManus contends the trial court improperly refused his proposed jury instruction regarding the defense of one's dwelling. The State argues the evidence did not support the giving of the denied instruction because the place where McManus stayed and where he killed Martin was not a dwelling. Indiana Code Section 35-41-1-10 defines "dwelling" as "a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging." We agree with the State. The record does not show that the wooded area where McManus and Martin were staying included a building, structure, or enclosed space of any kind. With due respect to homeless persons, we simply cannot conclude that the demarcation of an open-air area with a comforter, pillows, branches, and leaves constitutes an "enclosure" as contemplated by the self-defense statute.

The evidence did not support the giving of an instruction regarding self-defense of a dwelling.

It also is important to note that there is conflicting evidence as to what actually happened in this case. On appeal, McManus argues he should have had the right to defend what he called his "dwelling." However, in the statement he gave to police McManus did not say he stabbed McManus because he was defending his "dwelling"; instead, he said he stabbed McManus as a result of a physical altercation regarding his bicycle. McManus did not testify at the trial. McManus has also failed to show that the instruction regarding a "dwelling" was supported by the evidence for the additional reason that there is no indication that any entry by Martin was unlawful, because Martin shared the wooded area with the others. In sum, the trial court did not err in instructing the jury.

II. Mens Rea

McManus challenges the sufficiency of the evidence sustaining his conviction for murder. In reviewing a sufficiency of the evidence claim, we neither reweigh the evidence nor assess the credibility of the witnesses. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We consider the probative evidence and reasonable inferences supporting the verdict, and may only reverse the trial court's decision if no reasonable fact-finder could have found the elements of the crime proven beyond a reasonable doubt. Id. In order to overcome reasonable doubt, the State does not need to overcome every reasonable hypothesis of innocence. Id. at 147.

McManus specifically claims he did not knowingly kill Martin. He argues he only acted recklessly, and there was insufficient evidence to demonstrate beyond a reasonable

doubt that he acted knowingly. In order to convict McManus of murder, the State was required to prove that he knowingly or intentionally killed another human being. Ind. Code § 35-42-1-1. "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." I.C. § 35-41-2-2(b).

McManus said he did not mean to stab Martin or intend to cause his death, but he pulled the knife from his pocket and stabbed Martin multiple times. After the physical altercation, McManus did not call for help or call for an ambulance. Instead, he burned his clothes. When the police arrived, McManus threw his knife. The knife was recovered and found to have Martin's blood on it. The autopsy revealed Martin died from the stab wounds.

McManus is asking us to reweigh the evidence and judge the credibility of the witnesses, and we cannot do that. See Drane, 867 N.E.2d at 146. There was sufficient evidence at trial from which a jury could have found McManus guilty of murder beyond a reasonable doubt. The jury had the exclusive responsibility to determine whether McManus acted knowingly or recklessly after hearing witness testimony first-hand and considering reasons to believe or not to believe McManus's argument, and the jury found McManus acted knowingly. We see no reason to disturb that decision.

III. Self-defense

McManus also contends that the State presented insufficient evidence to rebut his claim of self-defense. We use the same standard to review a challenge to the sufficiency of evidence to rebut a self-defense claim as we would for any sufficiency claim. Wilson v. State, 770 N.E.2d 799, 801 (Ind. 2002). We will not reweigh the evidence or judge the

credibility of witnesses. Id. "If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed." Id. Once a defendant claims self-defense, the State bears the burden of disproving the claim. Pinkston v. State, 821 N.E.2d 830, 842 (Ind. Ct. App. 2004), trans. denied. "The State may satisfy its burden by either rebutting the defense directly or relying on the sufficiency of evidence in its case-in-chief." Id.

"A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force." I.C. § 35-41-3-2(a). An individual is justified in using deadly force only if he or she "reasonably believes that that force is necessary to prevent serious bodily injury to [the individual] or a third person."[2] Id. In order to prevail on a self-defense claim when deadly force is used, a defendant must show that he or she: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. Wilson, 770 N.E.2d at 800. To disprove a self-defense claim, the State need negate only one of these elements. See id. Additionally, the amount of force that an individual may use to protect himself or herself must be proportionate to the urgency of the situation. Harmon v. State, 849 N.E.2d 726, 730-31 (Ind. Ct. App. 2006).

The evidence most favorable to the conviction, as related through McCabe's testimony, is that McManus stabbed Martin because of Martin's refusal to leave an area

[2] This presupposes that the defendant was not attempting to terminate unlawful entry into his or her dwelling, a claim by McManus that we already have rejected, or an occupied motor vehicle.

where several homeless men regularly congregated. Even if we were to accept at face value McManus's statement to police that he stabbed Martin while the two were scuffling over McManus's bike and rolling down a hill, this did not justify the use of deadly force against Martin. The jury properly could have concluded that McManus did not have a reasonable fear of death or serious bodily injury at the hands of Martin, who appears to have been unarmed, when McManus stabbed him multiple times. In other words, whatever version of events the jury believed, there was sufficient evidence that McManus's stabbing of Martin was a grossly disproportionate overreaction to any threat to McManus that Martin might have posed.

IV. Sentence

McManus's final argument is that his fifty-five year sentence is inappropriate. Indiana Appellate Rule 7(B) provides, "[a]n appellate court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Although we do not have to be "very deferential" to the trial court or review sentences with "great restraint," we must and should exercise deference to a trial court's sentencing decision because the language in 7(B) requires us to give "due consideration" to that decision. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). Also, we understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. The burden is on the defendant to persuade us that his or her sentence is inappropriate. Id.

Indiana Code Section 35-50-2-3 provides: "A person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years . . . ." McManus contends his sentence was enhanced, and that the crime was not heinous because the murder was not premeditated or planned and he did not intend for the stabbing to occur. We first note that McManus's sentence was not enhanced; he received an advisory sentence. Moreover, trial courts technically no longer "enhance" sentences under the advisory sentencing scheme. See Pedraza v. State, 887 N.E.2d 77, 80 (Ind. 2008).

In any event, even if we were to agree with McManus that there was nothing about his killing of Martin that made it any more heinous than a "typical" murder, his character alone warrants the sentence he received. McManus has a lengthy criminal history that includes theft, public intoxication, criminal conversion, possession of drugs, battery, resisting law enforcement, disorderly conduct, and violations of probation. These convictions add up to fifteen misdemeanor and four felony convictions, beginning in 1987 when McManus was twenty and continuing until 2006. "The significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, and number of prior offenses in relation to the current offense." Rutherford v. State, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). Although none of McManus's prior convictions were as severe as the present offense, the sheer number of them, encompassing almost the entirety of McManus's adult life, is extremely troubling. We also find it to reflect poor character that McManus did not seek help after the stabbing occurred. We

conclude that an advisory sentence of fifty-five years, with five years suspended, is appropriate.

Conclusion

The trial court properly refused McManus's proposed jury instruction regarding the defense of one's dwelling. The State presented sufficient evidence that McManus knowingly killed Martin and to rebut his self-defense argument. Finally, McManus's sentence was appropriate in light of the nature of the offense and his character. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.